IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 620 OF 1987.

1. Ramsevak Singh Manikraj Singh.
2. Ujagirsingh Manikraj Singh
   (since deceased through L.Rs.)
   a) Smt.Parkali Devi
      (deleted as per order dt.
      23.11.2005 passed in C.A.
      No.4983/05.)
   b) Lalchand Ujagir Singh
   c) Radheshyam Ujagir Singh
      All residents Village
      Bartharkala, Post: Barthar
      Kala, Dist.Varanasi, U.P.
   d) Smt.Isloka Jayt Singh
      residing at Village Aharak,
      Post: Aharak, Dist.Varanasi,
      U.P. .... Appellants.

Versus.

Jang Bahadur Singh Ram Charitra Singh
(Since deceased through his L.Rs.)
(2a)1. Smt.Prabhavati Devi Jangbahadur
(2b)2. Ramchandra Jangbahadur Singh
both residing at Jang Bahadur
Chawl, Kurar Village, Malad
(East), Mumbai 400 097. .... Respondents.

Shri H.V.Gala i/by M/s.H.V.Gala & Co. for the Appellants.

Shri Avinash Avhad with Ms.Meena Kshirsagar for the Respondents.

CORAM : ABHAY S. OKA, J.

DATED : 24th March, 2006.

ORAL JUDGMENT.

1. Heard the learned Counsel appearing for the

parties. The First Appeal is filed by the original Defendants taking exception to the Judgment and Order passed by the learned Judge of the City Civil Court on 14th July 1987. The Respondents are the legal representatives of the original Plaintiff. By the said Judgment and order, the learned Judge granted declaration that the Appellants are the trespassers in respect of a portion admeasuring 40'x16' of CTS No.343 corresponding to Survey No.22/1D of village Kurar, Mumbai. The Appellants were directed to remove the structure on the portion admeasuring 40x16' and perpetual injunction was also granted restraining them from carrying out any construction.

2. With a view to appreciate the submissions made by the learned Counsel appearing for the parties, it will be necessary to refer to the facts of the case in brief. The Respondents filed a suit for declaration that the Appellants are the trespassers on the aforesaid portion of land admeasuring 40'x16'. The Respondents also claimed perpetual injunction. The case of the original Plaintiff is that by a lease agreement dated 3rd July 1960, he took a plot of land admeasuring 1000 square yards together with a hut standing thereon bearing Survey No.22, Hissa No.1 (part) situated at

village Kurar, Malad (East), Mumbai. According to the case of the Respondent one Bablya Jivlya Warli was the landlord who had let out the said land to the Respondents at the monthly rent of Rs.10/-. According to the case of the original Plaintiff, sometime in December 1960, he converted the original hut standing on the suit plot into a shed admeasuring 35'x31'. The case of the original Plaintiff is that he is the lessee of the said plot and the owner of the said structure constructed by him. The case of the Plaintiff is that on 8th October 1972 when he was away at his native place, the Appellants trespassed on a portion of the suit land admeasuring 40'x16' and constructed a structure thereon. According to the case of the original Plaintiff, he filed complaints with the various authorities. On 9th October 1972, when the original Plaintiff came back to Bombay, he noticed unauthorised construction being carried on by the Appellants.

3. The suit was contested by the Appellants by filing written statement. The Appellants contended that neither the original Plaintiff nor his predecessor-in-title of Bablya Jivlya has anything to do with Survey No.22, Hissa No.1. It is contended that Bablya had executed similar bogus lease deeds in favour

of other persons. It is pointed out that in the year 1967 a similar suit was filed by the original Plaintiff against the Appellants and the Mumbai Municipal Corporation which came to be withdrawn. It is suggested that the said land originally belonged to Estate & Finance (Pvt.) Ltd. According to the case of the Appellants one Ratanchand Hiranchand Baldota filed an application before the Tahsildar, Borivali against the said company. An enquiry was held and the name of the Appellants was mutated in the Revenue Records.

4. The learned trial Judge framed issues and the parties led their respective evidence in support of their case. The learned trial Judge held that the original Plaintiff has failed to prove the title of his predecessor Bablya Jivlya Warli in respect of the suit land. It is also held that he has failed to prove that he took on lease land admeasuring 1000 sq.yards from the said Bablya. The trial Court however found that the Plaintiff was in possession of the suit land and that the Appellants have illegally encroached upon the area of 40’x16’.

5. The learned Counsel for the Appellants submitted that the suit filed for declaration and injunction was

on the basis of title. The title as pleaded in the plaint was that the Plaintiff was a lessee in respect of the suit land. He submitted that as the socalled document of lease was not admissible in evidence and as the Plaintiff has failed to prove title of his predecessor-in-title, he cannot succeed in the suit as the suit is based on the title. He also pointed out that in the earlier suit, the Plaintiff has tried to claim adverse possession. He, therefore, submitted that the suit ought to have been dismissed only on the ground that the Plaintiff had failed to prove his title.

6. The learned Counsel for the Respondents submitted that there is voluminous evidence on record to prove the long standing possession of the Plaintiff. As the Plaintiff has established his prior possession and dispossession at the hands of the Appellants, no interference can be made with the mandatory injunction granted by the trial Court as even the Appellants have failed to establish that they have any title to the suit land. He submitted that as the possession of the Plaintiff is established on the basis of evidence on record, the learned trial Judge was right in passing the decree for mandatory injunction. He submitted that the only declaration which is granted is that the Appellants

are trespassers. He pointed out that the Appellants have not proved their title and therefore the declaration granted cannot be disturbed.

7. I have considered the submissions. The trial Court has held that the so called document of lease on which reliance was placed by the Plaintiff is insufficiently stamped. The learned Judge also found that the said document is not registered. Taking the case of the Respondents as it is, section 107 of the Transfer of Property Act, 1882 makes the document compulsorily registerable. Therefore, the learned Judge found that the socalled document of lease was not admissible in evidence.

8. The case of the Plaintiff was that the said Bablya was the owner of the suit land. It is pertinent to note that the Plaintiff made no efforts to examine the said Bablya. It is pertinent to note that in paragraph 11 of his examination-in-chief, the Plaintiff has stated thus:

> "11. **I am claiming right to the suit land by adverse possession as also as a person claiming through Bablya. I have stopped**

> **paying ren to Bablya from 1974-75. I am claiming adverse possession in respect of the suit land even against Bablya and maintain that I am the owner of the suit land. As I came to know that Bablya had no interest in the suit land, I stopped paying rent to him.** I came to know of it in 1974-75. I did not intimate Bablya that I will not pay the rent to him as he was not the owner. Since 1974-75, Bablya never sent me a notice demanding rent. He was not even filed any suit against me to evict me from the suit land." (Emphasis supplied).

Thus in examination-in-chief itself the Plaintiff has stated that he was claiming adverse possession even against the said Bablya. For the first time he came out with a case that he was the owner of the suit land. He, however, explained that he has came out with the said case as he came to know that Bablya has no interest in the suit land. Thus in the suit filed on title based on lease executed by the said Bablya, in examination-in-chief itself the Plaintiff has completely changed his stand and tried to contend that he was claiming adverse possession. He in fact contended that Bablya had no

interest in the suit land. It is pertinent to note that even as an alternative pleading, plea of adverse possession is not found in the plaint. The Plaintiff who based his suit on the basis of title as a lessee has virtually given up his case in his examination-in-chief itself by stating that his predecessor had no title.

9. The learned trial Judge even after recording a finding on this aspect in favour of the Appellants has proceeded to pass a decree against the Appellants. In fact declaratory decree is passed holding that the Appellants are trespassers. So far as the relief of declaration is concerned, it is governed by section 34 of the Specific Relief Act, 1963. It is well settled that the relief of declaration is an equitable relief. The same is the case with grant of perpetual injunction under the said Act of 1963. In a decision of the Apex Court reported in (2005) 11 S.C.C. page 109 (Kanchusthabam Satyanarayana and others v/s. Namuduri Atchutaramayya and others), the Apex Court held that discretionary relief such as injunction being in the nature of equitable relief must be granted interalia on consideration of equity and justice, and appellant who is himself guilty of inequitable conduct cannot claim such relief. Another decision of the Apex Court relied

upon by the Appellants is reported in (1995) 3 S.C.C. page 426 (Nagar Palika, Jind v/s. Jagat Singh, Advocate). This was a case wherein the Respondent-Plantiff had failed to prove his title and inspite of this fact it was submitted that even if he has failed to prove his title, the suit filed by him should be treated as based on possession and dispossession in terms of section 6 of the Specific Relief Act, 1963. The question considered by the Apex Court is as under:

> "Once a suit has been filed by the Respondent claiming to be the owner and being in possession of the land in question, how the suit can be treated as a suit based on possession and dispossession without reference to the title.?"

The Supreme Court answered the question in the following words:

> "Disputed questions of title are to be decided by due process of law but the peaceful possession is to be protected from the trespasser under section 6 of the Act without

> regard to the question of the origin of the possession. Such suit can be entertained and decreed only where both the plaintiff and the defendant have no title to the suit land, but as the plaintiff proves his prior possession, because of that he is entitled to a decree for possession against the defendant who has dispossessed him. **The plaint of such a suit must aver only previous possession and dispossession by the defendant, otherwise than in due course of law."** (Emphasis supplied).

In paragraph 9 of the decision, the Apex Court for the reasons stated earlier declined to apply provisions of section 6 of the Specific Relief Act, 1963 to a suit on title filed by the Respondent.

10. The learned Counsel for the Respondents attempted to argue that the suit may be treated as one filed on the basis of prior possession. A perusal of the plaint shows that the Respondent claimed title as a lessee through Bablya. The plaint does not proceed merely on the averment that the Plaintiff was in possession and was dispossessed within a span of 12 years prior to the date of institution of the suit. The

Plaintiff has based his suit on his title as a lessee.

11. As stated above, the relief of declaration and injunction is a discretionary relief. Such reliefs can be granted only on consideration of equity. This was a case wherein not only the Plaintiff failed to prove his title but in examination-in-chief itself he gave up the title and tried to set up a plea of adverse possession. In fact what was stated by him is that his predecessor in title Bablya had no title. He attempted to claim ownership over the suit land though in the plaintiff he claimed to be a tenant of Bablya. The Plaintiff also suppressed the fact of having filed earlier suit against Bombay Municipal Corporation and the Appellants. This was not at all a case for grant of relief of injunction as the Plaintiff has admittedly failed to establish his title which was pleaded in the plaint. Even if the Appellants did not establish their title, in such a suit a negative declaration could not have been granted by the learned trial Judge. The substantive prayers for declaration and injunction were based on title and if the Plaintiff has failed to establish the title, the suit ought to have been dismissed. The Plaintiff claimed title in the suit. In examination-in-chief he admitted that he cannot claim tenancy as the said Bablya

had no title. Now the Plaintiff cannot say that relief should be granted to him only on his prior possession. The suit is not based only on his prior possession. Equitable considerations demand that discretionary relief of declaration and injunction should not be granted in favour of such Plaintiff.

12. Accordingly the Appeal succeeds and the following order is passed:

i) The impugned Judgment and decree is set aside and S.C.Suit No.9256 of 1972 stands dismissed.

ii) There will be no order as to costs throughout.

Judge.